

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TACOMA RAILWAY & POWER CO.,  
a corporation,

*Plaintiff in Error,*

vs.

WILLIAM COTHARY AND MARGARET  
COTHARY, husband and wife,

*Defendants in Error.*

MOTION TO AFFIRM AND FOR DAMAGES  
AND BRIEF

## BRIEF OF DEFENDANTS IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES  
DISTRICT COURT OF THE WESTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION

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No. 2736

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MOTION

Now comes the above named defendants in error  
and move this Honorable Court to affirm the judgment entered in the court below and for damages in

the amount of ten per cent. on said judgment on the ground that it is manifest that the writ of error sued out in this cause was for delay only and also that the questions on which the decision of the case depends, as set forth in the assignment of errors, are so frivolous as not to need further argument.

This motion is based upon the printed record herein and in conformity to subdivision 5 of rule 6 and subdivision 2 of rule 23 of Rules of the Supreme Court of the United States; also rule 8 of this Honorable Court making said rules of the Supreme Court applicable in such cases; also subdivision 2 of rule 23 of this Honorable Court.

#### TEATS, TEATS & TEATS

*Attorneys for Defendants in Error*

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#### ARGUMENT ON MOTION

A chronological statement of the proceedings from the time of judgment herein to the present time shows delay on the part of plaintiff in error is the main object of suing out the writ of error.

This cause was tried before two juries, the first disagreeing and the second returning a verdict in favor of the defendants in error in the sum of \$2450.00.

Judgment entered June 14th, 1915. (Rec. 12.)

Petition for new trial filed July 23rd, 1915.  
(Rec. 16), 39 days after entry of judgment.

Petition for new trial denied August 2nd, 1915.  
(Rec. 16.)

Order granting 60 days from August 2nd, 1915,  
within which to file proposed bill of exceptions.  
(Rec. 17.)

Proposed bill of exceptions filed September 28th,  
1915.

Final bill of exceptions filed December 28th,  
1915, after the signing of the order settling the  
same. (Rec. 97.)

Assignment of errors filed December 13th, 1915.  
(Rec. 102.)

Petition for writ of error filed December 13th,  
1915.

Order allowing writ of error filed December  
13th, 1915.

Bond on writ of error filed December 22nd,  
1915.

Writ of error filed December 28th, 1915.

Transcript of record filed in this Honorable  
Court January 15th, 1916.

This record shows each step taken was practi-

cally upon the last day of grace in each instance.

## FRIVOLOUS ERRORS ASSIGNED

There are only three assignments of error:

*1st.* The court erred in refusing to grant defendants' motion for a DIRECTED VERDICT upon each and every one of the grounds set forth in the motion.

Each and every question involved was purely for the jury and I will not take up the time or space to reprint any of the evidence as it does not require any explanation. A casual reading of the evidence printed in the record is all that is necessary to see how frivolous this assignment is.

*2nd.* Error in admitting testimony of Oscar Helander who was with Mrs. Cothary at the time of the injury and attempting to go through the turnstile which stuck and held them out on the platform for only a few moments and until the accident occurred. He went to the turnstile about one week after the accident and the court permitted him to tell what he found which held the turnstile from turning and preventing Mrs. Cothary and the witness and his wife from passing through. The grounds of objection was that the testimony was too

remote. (Rec. 31-32.)

We submit this evidence was competent, as the witness states he went to see why the turnstile refused to revolve.

A few days later, on the 1st day of August, the carpenter of the plaintiff in error testified he went there and found the gate in perfect condition (Rec. 66-7) except that he found the ratchet raised with a spike driven into it so that the gate could be turned either way and he put in some new spindles to replace the broken ones.

*3rd.* The third assignment of error is in permitting the plaintiff below to read the testimony of one Paul Jackson given at a former trial of the case for the purpose of impeachment without laying proper grounds for impeachment questions. To understand that point it will be necessary to quote the testimony at this, the second trial.

After describing what he did, while running his car down towards the turnstile, he states "I then put on the emergency brakes and then ran down past the stile and struck her and then ran two car lengths beyond."

Q. So that when you stopped, you had traveled from the point of collision three car lengths of

that car before you stopped?

A. No, sir, I won't say it was that far.

Q. Didn't you say so in your testimony before?

A. I don't remember of it.

Q. The length of that car is about forty-five or fifty feet?

A. Yes, sir.

Q. And the distance that your car stopped, the rear of your car was then about one hundred feet beyond the point of collision, wasn't that the fact?

A. That would make the rear end two car lengths from the time I hit her.

Q. That would make the rear end two car lengths, or about one hundred feet beyond the point of collision, isn't that a fact?

A. No, sir. I wouldn't say that the car was one hundred feet from the time that I hit her.

Q. And the point of your car was three lengths from the point of collision, isn't that a fact?

A. No, I would not say that either.

Q. Or about one hundred and fifty feet?

A. No, sir.

Q. And didn't you so testify in the trial before?

A. I don't remember saying the rear end of the



car was two car lengths from the place where I hit her.

Q. (Reading.) "Q. You were the length of two cars past this turnstile before your car stopped?

A. Yes, sir.

Q. That is, the rear of your car was two car lengths away from the turnstile?

A. About that."

Q. Didn't you answer that way?

A. I do not remember of it.

Q. Don't you remember that was your testimony before?

A. That may have been my testimony, but I don't remember all the statements which I made.

Q. Isn't that the testimony that you gave here before on the trial of this case?

A. It may have been; I do not remember.

Q. "Q. That would be three times forty-five or one hundred and thirty-five feet after you passed the turnstile before you stopped your car?

A. From where I was? Q. Yes. A. It would be around that some place." Isn't that what you testified to?

A. I could not say as to that. Of course, if it

is down on paper, it may have been.

Q. Don't you remember now that is the way you testified before?

A. I could not say that it is.

Q. Don't you remember now that is about the facts of the case as far as you remember?

A. I remember something about two car lengths, but I don't remember whether it was the rear end or not."

Then to clear up that matter as to what was the testimony of the witness at the former trial, he stating that he did not remember and testifying differently at this the second trial, the plaintiff below introduced and had read from the notes questions and answers set forth in assignment of error No. 3, which proceedings are fully set forth at pages 76 to 80 inc. of the record.

The assignment of error certainly is frivolous.

We submit the record shows this writ of error was sued out for delay and the rule should be enforced affirming the judgment and imposing a penalty of ten per cent. as provided by section 1010 of the Revised Statute and the rule of this Honorable Court and of the United States Supreme Court.

*Gregory Const. Mining Co. vs. Starr*, 11 Sup.  
Crt. Rep. 914.

*Chicago Ry. vs. Bomberger*, 130 Fed. 884.

*Texas vs. Volk*, 14 Sup. Crt. Rep. 239.

*Pennsylvania Company vs. Donat*, 36 Sup.  
Crt. Rep. 4.

Respectfully submitted,

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